urge others to join the organization. The Circuit Court recognizes this in an opinion vindicating the right of the United Mine Workers to unionize and to win recruits to the union cause by appeals to reason unaccompanied by violence or other illegal methods.

PUBLIC TORTS. — The division of criminal offenses into felonies and misdemeanors is not an adequate classification. Particularly in the application of the doctrine of *mens rea* have courts come to realize this fact. Several attempts have been made to establish new categories. Thus, actions for breach of police regulations have been termed *quasi*-criminal.[1] A further striking example is the division of offenses into crimes *mala per se* and *mala prohibita*.[2] Of late years a new classification of criminal offenses has been introduced, namely, public torts[3] and real crimes.

The term "public torts" refers to injuries to the state which are treated as analogous to civil injuries, actionable criminally either at common law or by statute. These include three classes of cases: injuries to public property, public nuisances, and police offenses.[4] The well-recognized right of the state to sue criminally for injuries to public property[5] rests on the historical disability of the state to sue for such wrongs in the civil courts.[6] Criminal action for public nuisances[7] falls within the same principle, since public nuisances in every case injure a property right of the state. In these cases it is necessary to look only at the nature of the act to determine whether it is a public tort. In statutory offenses, however, the legislative intent must govern. Violations of police regulations are ordinarily considered wrongs against the state not serious enough to constitute real crimes and are therefore treated as torts infringing the public interest in health and security.[8] But if the legislature considers the act sufficiently dangerous to the state to require punishment, it is a crime. Consequently the question whether a violation of a particular police regulation is a public tort or a real crime depends on whether the legisla-

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[1] See Wiggins *v.* Chicago, 68 Ill. 372, 375 (1873).

[2] See 1 BISHOP, NEW CRIM. LAW, 8 ed., § 295.

[3] See BEALE, CAS. CRIM. LAW, 3 ed., 81.

[4] See Sherras *v.* De Rutzen, [1895], 1 Q. B. 918, 921.

[5] Comm. *v.* Eckert, 2 Browne (Pa.), 249 (1812); Comm. *v.* King, 13 Met. (Mass.) 115 (1847).

[6] The state, on account of its supposed legal ubiquity, cannot be disseised, and therefore cannot maintain the direct action of ejectment or trespass to try title. State *v.* Stark, 3 Brev. (S. C.) 101 (1812); State *v.* Pacific Guano Co., 22 S. C. 50 (1884). See also State *v.* Paxson, 119 Ga. 730, 46 S. E. 872 (1904).

[7] King *v.* People, 83 N. Y. 587 (1881); Comm. *v.* Sharpless, 2 S. & R. (Pa.) 91 (1815). For other cases of public nuisances see 2 WOOD, NUISANCES, 3 ed., 1208.

[8] See Helena *v.* Kent, 32 Mont. 279, 290, 80 Pac. 258, 261 (1905); Brookville *v.* Gagle, 73 Ind. 117 (1880). At common law such action might be brought in debt or assumpsit. See 1 DILLON, MUNIC. CORP., 4 ed., § 409. See also Steinert *v.* Sobey, 14 App. Div. 505, 44 N. Y. Supp. 146 (1897); C. Beck Co. *v.* Milwaukee, 139 Wis. 340, 348, 120 N. W. 293, 295 (1909). But see *contra*, Pearson *v.* Wimbish, 124 Ga. 701, 52 S. E. 701 (1905); Stone *v.* Paducah, 120 Ky. 322, 323, 86 S. W. 531, 534 (1905).

tive body intends the penalty provided to be compensation [9] or punishment. Wherever imprisonment is prescribed or permitted it is clear that the latter is the case.[10] It thus seems that public torts include all wrongs against the state actionable criminally, the penalties for which are not intended as punishment.

This distinction between public torts and real crimes gives rise to important consequences: (1) *Mens rea* is not requisite for public torts; [11] the penalty to the individual is so slight that, bearing in mind the directness of the injury to the state, justice requires that the defendant be held for his anti-social act regardless of intent.[12] But *mens rea* is a necessary element for all real crimes. It is therefore necessary only to determine whether the offense be a public tort to settle this vexing problem of the necessity for *mens rea*.[13] This distinction is borne out by the cases, not only as regards injuries to public property and nuisances, but also as regards police offenses.[14] Consistent with this principle is a recent case [15] holding mistake of fact negating *mens rea* a defense in an action for violation of a liquor statute prescribing fine and imprisonment as punishment. The case is clearly right, since the act is made a crime, not a public tort. (2) Where the defendant while engaged in the commission of one crime commits another without intent to do the latter act, the criminal intent is carried over from the first act so as to constitute *mens rea* for the second.[16] But intent to commit a tort is not *mens rea*. Hence where the first offense is a public tort and the second

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[9] So at common law public torts are penalized by fine only to provide redress to the state. See 2 WOOD, NUISANCES, 3 ed., 1305. The defendant may be imprisoned until he pays the fine, but this does not change the character of the offense. The imprisonment may be likened to equity's power of enforcement. It is meant, not as punishment, but to induce payment.

[10] See 15 HARV. L. REV. 660. It may be suggested that the same act can be a public tort in one state and a crime in another, because the one state inflicts only a fine, while the other commands imprisonment. There is in fact nothing inconsistent in this. One legislature deems the act serious enough to be a crime; the other does not. This testing by the penalty is no innovation. It is well settled that whether an offense is a felony or a misdemeanor is determined by the extent of the punishment. People *v.* Sacramento Butchers' Prot. Ass'n, 12 Cal. App. 471, 107 Pac. 712 (1910).

[11] Comm. *v.* Boynton, 2 Allen (Mass.) 160 (1861); Comm. *v.* Farren, 9 Allen (Mass.) 489 (1864); Comm. *v.* Weiss, 139 Pa. St. 247 (1891); People *v.* Kibler, 106 N. Y. 321, 12 N. E. 795 (1887). But see *contra*, Teague *v.* State, 25 Tex. App. 577 (1888); Mulreed *v.* State, 107 Ind. 62 (1886).

[12] "There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him to . . . the loss of civil rights, to imprisonment with hard labor, or even to penal servitude, is a very different matter." Wills, J., in Reg. *v.* Tolson, 23 Q. B. D. 168 (1889).

[13] See John Wilder May, "*Mens Rea*," 12 AM. L. REV. 469. The learned author deplores the fact that contrary decisions were handed down on what he took to be the same set of facts. See Comm. *v.* Emmons, 98 Mass. 6 (1867); Stern *v.* State, 53 Ga. App. 229 (1874). But while the act is almost identical in both cases (allowing a minor to enter a pool-room), the former case provided a penalty only; in the latter imprisonment was the punishment. The act was therefore a public tort in Massachusetts, a crime in Georgia. The cases are quite consistent.

[14] Reg. *v.* Stephens, L. R. 1 Q. B. 702 (1866). See also note 11, *supra*.

[15] Coury *v.* State, 200 Pac. 871 (Okla. 1921). For the facts of this case see RECENT CASES, *infra*, p. 471. *Accord*, State *v.* Brown, 188 Mo. App. 248, 175 S. W. 131 (1915); State *v.* Cox, 91 Ore. 518, 179 Pac. 575 (1919).

[16] Comm. *v.* Mink, 123 Mass. 422 (1877).

a crime, there being no *mens rea* originally, the defendant cannot be held criminally for the second act which he did not intend.[17] (3) It is constitutional to have no trial by jury in the case of a public tort.[18] (4) The plea of double jeopardy is not open to one convicted of a public tort, when accused of a crime on the same facts.[19] This case usually arises where an ordinance prescribes a penalty, and a statute inflicts imprisonment, for the same offense. Finally, it may be suggested that the ordinary requirement that the prosecution prove its case beyond a reasonable doubt does not extend to public torts.[20]

WHO PAYS FOR THE WIFE'S DEFENSE IN A DIVORCE ACTION?—Now that women sit in legislatures and upon juries, we may well wonder to find still blooming a doctrine which flowered when the married woman was at law the equal of the infant and the idiot. An English woman recently sued for divorce on the grounds of adultery, obtained the "usual interlocutory order" for costs.[1] This order required the husband to furnish suit-money[2] for her defense.[3] In England it has always been the established rule[4] that the solicitor who in good faith[5] and for prob-

[17] State *v.* Horton, 139 N. C. 588 (1905). Where the defendant violates a police ordinance regulating speed, and thereby injures another, he is not guilty of assault and battery. Comm. *v.* Adams, 114 Mass. 323 (1873). On the other hand, if the legislature makes the act a crime by prescribing imprisonment, the defendant may be held for manslaughter. People *v.* Harris, 182 N. W. 673 (Mich., 1921). This principle has been lost sight of in a few cases, where the defendant has been held guilty of manslaughter, although the statute in question provided merely a money penalty. See State *v.* Gash, 177 N. C. 595, 99 S. E. 337 (1919); Bell *v.* State, 7 Ohio App. 185 (1918); State *v.* Rountree, 106 S. E. 669 (N. C., 1921). See also State *v.* Collingsworth, 82 Ohio St. 154, 92 N. E. 22 (1910).

[18] Williams *v.* Augusta, 4 Ga. 509 (1848), approved Floyd *v.* Commissioners, 14 Ga. 354 (1853); Sutton *v.* McConnell, 46 Wis. 269, 280, 50 N. W. 414, 416 (1879). See also 1 DILLON, MUNIC. CORP., 4 ed., § 433. But see *contra*, Creston *v.* Nye, 74 Iowa, 369 (1888). In Byers *v.* Comm., 42 Pa. St. 89 (1862) the court held no jury trial necessary although imprisonment was the punishment. This is clearly wrong.

[19] Leitchfield Merc. Co. *v.* Comm., 143 Ky. 162, 136 S. W. 639 (1911). But see *contra*, State *v.* Cowan, 29 Mo. 330 (1860), where the lightness of the imprisonment (five days) undoubtedly influenced the court. The court carried too far the principle here advocated in State *v.* Clifford, 45 La. Ann. 980 (1893), where imprisonment was provided. See also Jenkins *v.* State, 14 Ga. App. 276, 80 S. E. 688 (1914), commented on in 27 HARV. L. REV. 681.

[20] Peterson *v.* State, 79 Neb. 132, 112 N. W. 306 (1907).

[1] Franklin *v.* Franklin, [1921] P. 407. For the facts of this case, see RECENT CASES, *infra*, p. 470.

[2] In England "suit-money" is known as "costs." See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 973. Such "costs" are allowed *pendente lite*, and must be distinguished from ordinary costs, which, though in the discretion of the court since THE MATRIMONIAL CAUSES ACT of 1857 (20 & 21 VICT., c. 85, § 51), usually follow the event, apparently by analogy to rule 1, order LXV, RULES SUPREME COURT OF JUDICATURE (1883). See RAYDEN, DIVORCE, 193.

[3] Such orders are made under the authority of Divorce Rules made in accordance with the provisions of the JUDICATURE ACT (38 & 39 VICT., c. 77, § 18). See DIVORCE RULES 158 and 159 (26 Dec., 1865), and 201 (14 July, 1875) collected in RAYDEN, DIVORCE, 301 *et. seq.*

[4] See SHELFORD, MARRIAGE AND DIVORCE, 533; 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 973.

[5] The husband need not pay where the defense is fictitious. Clark *v.* Clark, 4 Sw. & Tr. 111 (1865). Or unreasonable. Kershaw *v.* Kershaw, 23 T. L. R. 296 (1907).